Filed 11/16/09 Mr. Welt Pocket & Cutting v. Lawn CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MR. WELT POCKET & CUTTING, INC., Plaintiff and Respondent, v. LINA EL LAWN, Defendant and Appellant.	B211612 (Los Angeles County Super. Ct. No. BC 371013)

APPEAL from an order of the Superior Court of Los Angeles County. Susan Bryant-Deason, Judge. Affirmed.

Christie Gaumer for Defendant and Appellant.

The Guerrini Law Firm and John D. Guerrini for Plaintiff and Respondent.

Defendant Lina El Lawn appeals from the order denying her motion to set aside a default judgment contending she was never served with the complaint. We affirm.

FACTUAL AND PROCEDURAL SYNOPSIS

On May 11, 2007, Mr. Welt Pocket & Cutting, Inc. (Mr. Pocket) filed a complaint for book account and account stated based on two invoices (totaling $80,621.49) for clothing related services rendered to Ben Ryan, Inc. (BRI). The complaint alleged BRI was the alter ego of Lawn and Erin Schacter, another named defendant. Lawn was personally served on August 22, 2007.

On November 16, 2007, Mr. Pocket submitted a request to enter default to the court. Mr. Pocket submitted a judgment package on February 27, 2008, and the court entered judgment against Lawn on March 4.

On July 21, pursuant to Code of Civil Procedure section[1] 473.5, Lawn moved to set aside the default and default judgment on the basis she had not been personally served. Lawn's motion was supported by her declaration stating she was not in the office on the purported date of service. Lawn also attached an alleged credit card receipt showing charges on the purported date of service, but the court ruled the document was inadmissible hearsay.

The court denied the motion, finding: "The proof of service shows that she was personally served with the summons and complaint. The proof of service complies with the statutory requirements thereby creating a rebuttable presumption of good service. The defendant's declaration does not rebut that presumption because it lacks credibility in stating that the defendant was spending time with her mother from out of state, and that she did not go into the business office where personal service took place on August 22, 2007. This self-serving testimony and the ambiguous credit card receipts fail to sufficiently demonstrate that the defendant was not properly personally served."

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1 All statutory references are to the Code of Civil Procedure.

DISCUSSION

Appellant contends she was not personally served. Compliance with the statutory procedures for service of process is essential to establish personal jurisdiction, and a default judgment entered against a defendant who was not served with a summons in the manner prescribed by statute is void. (*Dill v. Berquist Construction Co*. (1994) 24 Cal.App.4th 1426. 1444.) Filing of a proof of service creates a rebuttable presumption that service was proper. (*Id*., at p. 1441.)

Upon a motion to set aside a final judgment for lack of service, "'where the evidence is conflicting, the court has a sound discretion to grant or deny the motion, and in the absence of a clear showing of abuse of discretion, the order will not be interfered with on appeal therefrom.'" (*Crescendo Corp. v. Shelted, Inc*. (1968) 267 Cal.App.2d 209, 213.)

Appellant argues section 473.5 was the proper statute to seek relief as a person other than appellant was served with the summons and complaint. "This section [§ 473.5] is designed to provide relief where there has been proper service of summons (e.g., by substitute service or by publication) but defendant did not find out about the action in time to defend." (Italics deleted.) (Weil, Cal. Practice Guide; Civil Procedure Before Trial (The Rutter Group 2009) § 5:420, p. 5-104.3; see also *Solot v. Linch* (1956) 46 Cal.2d 99, 105.)

According to Lawn's declaration, BRI was a corporation owned by two shareholders -- Lawn and the Schacter Trust for which Erin Schacter, the other named defendant, was a beneficiary. When BRI shut down due to financial difficulties, Lawn went to work for another manufacturer -- 2 BB Unlimited, Inc. (2BB) on 1st Street in Los Angeles, which is the address shown on the proof of service. Lawn stated her office at that building was not accessible unless entry was granted by the employees who sat in the common area in the front of the office. Lawn's practice was not to allow people to visit her unannounced.

During Lawn's final days of employment with 2BB, her mother visited her from overseas, including from August 21 through 23, 2007. While her mother was visiting, Lawn was out of the 2BB office taking time off to be with her mother. No one at the 2BB offices gave appellant the summons and complaint.

Ignoring the court's ruling her credit card statement was inadmissible hearsay, Lawn also claims that statement refutes the proof of service. The statement, which is simply a list of dates with the name of places and amounts, does not identify itself as a credit card statement, and even if it had been properly authenticated, the fact Lawn made charges on August 22 at Ralphs and Starbucks[2] does not prove she was not at the office when the complaint was served as those are places at which appellant could have stopped on her way to or from work or on her lunch break.

Lawn argues the proof of service is ambiguous because of the wording of line 5, which provides: "I served the party: [¶] a. by personal service. I personally delivered the document listed in item 2 to the party or person authorized to receive service of process for the party." (Emphasis deleted.) Appellant reasons that because of the alternate language of "person authorized," the complaint was delivered to an employee of 2BB and not directly to her. The superior court rejected this argument noting the proof of service did not have an address to which a copy of the summons and complaint was mailed as it would have if there had been substitute service. (See § 415.20.)

The proof of service form used by respondent's process server was that adopted by the Judicial Council -- form POS-010. (See Weil, Cal. Practice Guide; Civil Procedure Before Trial, *supra*, § 4:361, p. 4-57.) The instructions for that form state box 5a "should be checked if service or delivery was made in person" and box 5b and related boxes "should be checked if service was made by a combination of substituted service and service by mail." (45 Cal. Forms of Pleading and Practice (Matthew Bender 2009) Service of Summons and Papers, § 518.72[3][b], p. 518-127.) Thus, the process server

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[2] Appellant claims the "statement" shows she made a purchase at American Apparel on August 22, but the statement show that purchase was on August 21.

used an abbreviated version of the form listing only box 5a to indicate personal service; the fact there was no box 5b on the form corroborates the service was personal. Appellant notes that the proof of service does not describe her, but points to no legal authority requiring that it do so.

Citing *Elston v. Turlock* (1985) 38 Cal.3d 227, 232-233, appellant argues the court should have granted her motion as the law favors trial on the merits, any doubts are resolved in favor of granting relief, and only slight evidence is needed for relief. However, the motion discussed in *Elston* was pursuant to section 473, which allows for relief based on "mistake, inadvertence, surprise, or excusable neglect." The instant motion was pursuant to section 473.5 based on lack of personal service; something that either occurred or did not occur.

Appellant posits that the timing of respondent's activities (i.e., the timing of service and entry of default) shows it understood she lacked knowledge of service of process. Appellant speculates that because she had an adversarial relationship with her co-defendant, her co-defendant told respondent to serve appellant at 2BB and notes the co-defendant was dismissed from the action. The court noted appellant had no substantiation for her claims and the record showed the co-defendant resolved the matter in mediation and was dismissed.

Appellant complains respondent did not provide any corroboration, such as a declaration from the process server, for the proof of service. However, appellant also failed to provide any corroboration, such as a declaration from her mother or her employer/employees at 2BB stating appellant was not in the office on August 22 at the time of service. Thus, as the evidence was conflicting, appellant did not rebut the presumption service was valid or demonstrate the court abused its discretion in denying her motion.

DISPOSITION

The order is affirmed. Respondent is awarded costs on appeal.

WOODS, J.

We concur:

PERLUSS, P. J.

JACKSON, J.